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# Nonresident Defendants Don't Deserve Convenience or Justice in South Carolina

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# NONRESIDENT DEFENDANTS DON'T DESERVE CONVENIENCE OR JUSTICE IN SOUTH CAROLINA?

## I. INTRODUCTION

When a South Carolina court acquires personal jurisdiction over a defendant based solely on the state's long-arm statute, the defendant cannot change venue for the convenience of witnesses or the ends of justice.[1] The following hypothetical[2] demonstrates how South Carolina's long-arm statute unfairly denies nonresident defendants the same opportunity to change venue that resident defendants have to avoid gross inconvenience and injustice.

Bill Jones, a resident of Augusta, Georgia, was driving through Aiken County, South Carolina, on Interstate 20 when he collided with another car. He struck the rear end of a vehicle driven by Alan Paul. Paul's wife, Ellen, was sitting in the passenger seat at the time of the accident. As a result of the accident, Ellen Paul suffered numerous injuries, including permanent disfigurement, and was unable to work for several months.

Subsequently, Ellen filed a complaint, naming both Bill Jones and her husband, Alan Paul, as defendants. The Pauls were residents of Aiken County. By joining her husband as a defendant, Ellen effectively destroyed Jones's opportunity to remove the case on diversity grounds. Rather than filing the complaint in Aiken County, the county where she resides and the county where the accident occurred, Ellen brought the suit in Allendale County pursuant to South Carolina Code section 15-7-30.[3] Similar to many South Carolina plaintiffs, Ellen filed suit in Allendale to take advantage of the generous juries for which that county is famous.[4]

Jones filed a motion to transfer venue to Aiken County for the convenience of witnesses and the ends of justice pursuant to South Carolina Code section 15-7-100(3).[5] In support of his motion to transfer venue, Jones introduced affidavits from

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1. S.C. CODE ANN. § 36-2-803(2) (Law. Co-op. 1977).

2. This hypothetical is based loosely on a motion to transfer venue that I observed during the summer of 2003.

3. S.C. CODE ANN. § 15-7-30 (Law. Co-op. 1977) provides that an action against a nonresident defendant "may be tried in any county which the plaintiff shall designate in his complaint."

4. *See Jackpot Jurisdiction?* (WJBF News CHANNEL 6 television broadcast, Aug. 19, 2002). Hampton County is also well known in South Carolina for munificent juries. *Jackpot Jurisdiction? Part III* (WJBF News CHANNEL 6 television broadcast, Aug. 21, 2002) ("Jury verdicts in Hampton County are three or four times higher than other similar sized counties in the state. Some call them 'plaintiff friendly.'").

5. S.C. CODE ANN. § 15-7-100(3) (Law. Co-op. 1977) ("The court may change the place of trial in the following cases: . . . (3) When the convenience of witnesses and the ends of justice would be promoted by the change.").

each of the four doctors who treated Ellen's injuries, all residents of Aiken County, stating that it would be more convenient for them to appear for trial in Aiken County. These affidavits noted that the distance from the medical providers' places of business to the Aiken County courthouse was much shorter than the distance to the Allendale County courthouse. Jones also offered an affidavit from the highway patrolman who investigated the accident stating that Aiken County was more convenient for him because the patrolman was a resident of Aiken County. Jones further noted to the Allendale court that none of the parties to the case had a connection to Allendale County: he was a resident of Augusta, Georgia; the plaintiff, Ellen, was a resident of Aiken; the other defendant, Ellen's husband, was a resident of Aiken; and the accident occurred in Aiken. In addition, all the eye-witnesses to the accident were residents of Aiken. Thus, all the witnesses to the case resided in or near Aiken, and no witness was connected to Allendale.

Ellen offered no affidavits or other evidence to rebut Jones's proof that transferring the case to Aiken County would promote the convenience of witnesses and the ends of justice. Instead, Ellen argued that because the Allendale court obtained personal jurisdiction over Defendant Jones pursuant to South Carolina's long-arm statute, section 36-2-803,[6] the action against Jones could not be transferred to another venue for the convenience of witnesses and the ends of justice. Specifically, section 36-2-803(2) provides that "[w]hen jurisdiction over a person is based solely upon this section . . . such action, if brought in this State, shall not be subject to the provisions of section 15-7-100(3)."[7] Despite the overwhelming evidence presented by Jones supporting his motion to transfer venue, the judge denied the motion simply on the basis of section 36-2-803(2).

Plaintiff lawyers in Allendale and Hampton Counties often use section 36-2-803(2) in their attempts to quash transfer of venue motions.[8] The inequities of this provision in the long-arm statute are clear, especially in a situation like that described above. South Carolina plaintiffs often file their claims in Allendale or Hampton County for the sole purpose of obtaining a large jury verdict.[9] Despite the inconvenience the proceedings in these counties might pose, a nonresident defendant has no recourse to transfer venue. The nonresident defendant is stuck in whatever county the plaintiff chooses.

To fully illustrate South Carolina's novel, unfair approach to long-arm jurisdiction, Part II of this Comment discusses the rationale behind long-arm jurisdiction generally and describes the history of South Carolina's long-arm statute. Part III argues that section 36-2-803(2) violates the Equal Protection Clause of the

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6. S.C. CODE ANN. § 36-2-803(1) (Law. Co-op. 1977) ("A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's . . . (c) commission of a tortious act in whole or in part in this State.").

7. *Id.* § 36-2-803(2).

8. I must credit an insurance defense lawyer, practicing in Columbia, South Carolina, for this statement.

9. *See Jackpot Jurisdiction?* (WJBF News CHANNEL 6 television broadcast, Aug. 19, 2002).

Fourteenth Amendment to the United States Constitution because it is not rationally related to a legitimate state purpose. Part IV demonstrates that this section also violates the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution because it denies nonresident defendants equal access to the courts of South Carolina to defend actions brought against them. Finally, Part V discusses potential arguments that nonresident defendants can make to avoid the section 36-2-803(2) prohibition against transfer of venue. Nonresident defendants can argue that the long-arm statute was not the sole basis of jurisdiction, and therefore, that section 36-2-803(2) should not apply to bar change of venue for the convenience of witnesses or the ends of justice.

## II. HISTORY

### *A. The Historical Role of Long-Arm Jurisdiction*

The judgment of a court lacking personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment.[10] Most courts in the 19th century followed the rule from *Pennoyer v. Neff*[11] that a court "could not exercise *in personam* jurisdiction over a nonresident who had not been personally served with process in the forum."[12] In the late 19th and early 20th centuries, courts began to relax the strict limits on state jurisdiction over nonresidents, adapting to changes in technology, transportation, and communication.[13] For example, the United States Supreme Court upheld state statutes that required nonresident corporations to appoint an in-state agent to receive service of process as a condition of transacting business within the state[14] and statutes providing in-state substituted service for nonresident motorists who caused injury in the state.[15]

The United States Supreme Court's opinion in *International Shoe Co. v. Washington*[16] set aside the Due Process requirement that service be made within the territorial limits of the jurisdiction in suits arising out of the nonresident defendant's activities in the state.[17] *International Shoe* established the "minimum contacts" standard to determine if asserting personal jurisdiction over a nonresident defendant comports with "'traditional notions of fair play and substantial justice.'"[18] Subsequent to *International Shoe,* states passed long-arm statutes to extend the personal jurisdiction of their courts over nonresident individuals and corporations

10. Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (dictum).
11. *Id.*
12. Burnham v. Superior Court of Cal., 495 U.S. 604, 616 (1990).
13. *See* Hanson v. Denckla, 357 U.S. 235, 260 (1958) (Black, J., dissenting).
14. *See* St. Clair v. Cox, 106 U.S. 350, 356 (1882).
15. *See* Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).
16. 326 U.S. 310 (1945).
17. *Id.* at 316.
18. *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

who could not be found and served in their fora.[19]

Long-arm statutes provide only for specific jurisdiction over nonresident defendants. Specific jurisdiction is limited to causes of action arising from the nonresident defendant's activities with the forum state.[20] Specific jurisdiction is, therefore, much more limited than general jurisdiction,[21] under which a court acquires *in personam* jurisdiction over a defendant in any suit, whether or not the suit arises from the defendant's activities within the forum.[22] Such broad jurisdiction over a defendant through general jurisdiction requires a showing of more substantial contacts with the forum state.[23] Different from the minimum contacts standard to acquire specific jurisdiction pursuant to a state's long-arm statute, a defendant's activities within the forum must be sufficiently continuous and systematic to submit the defendant to the general jurisdiction of the state's courts.[24] Ultimately, plaintiffs depend on their state's long-arm statutes to acquire personal jurisdiction over nonresident defendants who have limited contacts with their states for causes of action that arise from those limited contacts.[25]

### *B. The History of South Carolina's Long-Arm Statute*

South Carolina adopted its long-arm statute, oddly, as a floor amendment to the enactment of South Carolina's version of the Uniform Commercial Code in 1966.[26] South Carolina state Senator James P. Mozingo III proposed the amendment to add

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19. JOHN J. COUND ET AL., CIVIL PROCEDURE 81 (8th ed., West Group 2001) (1968) ("The first truly comprehensive long-arm statute was enacted in Illinois and it was used as a model by a number of states. According to the Illinois Supreme Court, the statute was an attempt to assert jurisdiction to the fullest permissible constitutional limits.").

20. *See* Sheppard v. Jacksonville Marine Supply, Inc., 877 F. Supp. 260, 264 (D.S.C. 1995) (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)).

21. However, in another sense, specific jurisdiction is more useful to some plaintiffs in the post-*International Shoe* era because general jurisdiction, with a heightened minimum contacts requirement, is frequently unavailable except in the defendant's state of domicile. *See infra* notes 23–25 and accompanying text.

22. *See Sheppard*, 877 F. Supp. at 264 (citing *Helicopteros*, 466 U.S. at 414 n.9).

23. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952) (considering whether "the business done in Ohio by the respondent mining company was sufficiently substantial and of such a nature to *permit* Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio").

24. *See id.* at 445–46 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)); *Helicopteros*, 466 U.S. at 414–16.

25. The majority in *Helicopteros* left open the question of whether there is a "meaningful distinction . . . between a cause of action that 'arises out of' a nonresident defendant's activity within the forum state and one that is merely 'related to' a defendant's forum state activities." Howard B. Stravitz, *Sayonara to Minimum Contacts*: Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 773 n.213 (1988). "The majority acknowledged the possibility of a jurisdictionally meaningful distinction between 'arising out of' and 'related to,' but declined to express any view on the matter because the parties did not argue the point." *Id.* at 724 n.213 (citing *Helicopteros* 466 U.S. at 415 n.10).

26. JOURNAL OF THE SENATE, S. 96, 2d Sess., at 917–22 (S.C. 1966).

the long-arm statute.[27] Mozingo was clearly an advocate of plaintiffs; he served as president of the American Trial Lawyers Association[28] and likely added the prohibition against changing venue into the long-arm statute to benefit South Carolina plaintiffs.

"Entitled 'Further Remedies,'[29] [the long-arm statute's] provisions appear as an eighth part of the sales article—a part not found in the Uniform Commercial Code's official version."[30] In fact, no other state has enacted its long-arm statute[31] as part of its Uniform Commercial Code.

South Carolina's long-arm statute defines "person" to include an individual, "whether or not a citizen or domiciliary of this State," and a corporation, "whether or not organized under the laws of this State."[32] This provision grants South Carolina courts personal jurisdiction under the following circumstances:

> Personal jurisdiction based upon conduct.
>
> (1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's
> (a) transacting any business in this State;

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27. *Id.*

28. SOUTH CAROLINA LEGISLATIVE MANUAL 30 (Clerk, House of Representatives ed., 1966).

29. S.C. CODE ANN. §§ 36-2-801 to 36-2-809 (Law. Co-op. 1977).

30. Robert F. Folks, Comment, *South Carolina's Uniform Commercial Code—The Demise of Its Long Arm Provisions*, 24 S.C. L. REV. 474, 474 (1972).

31. *See* ALA. R. CIV. P. 4.2(a)(2)(A)–(I) (Supp. 2002); ALASKA STAT. § 09.05.015 (Michie 2002); ARIZ. R. CIV. P. 4.2(a) (2002); ARK. CODE ANN. § 16-4-101(B) (Michie 1999); CAL. CIV. PROC. CODE § 410.10 (West 1973); COLO. REV. STAT. § 13-1-124 (West 2003); CONN. GEN. STAT. ANN. § 52-59b (West 2003); DEL. CODE ANN. tit. 10, § 3104(c) (1999); FLA. STAT. ANN. § 48.193 (West Supp. 2003); GA. CODE ANN. § 9-10-91 (Supp. 2003); HAW. REV. STAT. ANN. § 634-35 (Michie 2002); IDAHO CODE § 5-514 (Michie 1998); 735 ILL. COMP. STAT. ANN. 5/2-209(a) (West 2003); IND. R. TRIAL P. 4.4(A) (2003); IOWA CODE ANN. § 617.3 (West Supp. 2003); KAN. STAT. ANN. § 60-308(b) (Supp. 2002); KY. REV. STAT. ANN. § 454.210(2)(a) (Michie Supp. 2002); LA. REV. STAT. ANN. § 3201 (West 1999); ME. REV. STAT. ANN. tit. 14, § 704-A (West 2003); MD. CODE ANN., CTS. & JUD. PROC. § 6-103 (2002); MASS. GEN. LAWS ANN. ch. 223A, § 3 (West 2000); MICH. COMP. LAWS ANN. §§ 600.705, 600.715 (West 1996); MINN. STAT. ANN. § 543.19 (West 2000); MISS. CODE ANN. § 13-3-57 (2002); MO. ANN. STAT. § 506.500 (West 2003); MONT. R. CIV. P. 4B (2003); NEB. REV. STAT. § 25-536 (1995); NEV. REV. STAT. ANN. 14.065 (Michie 1998); N.H. REV. STAT. ANN. § 510:4 (1997); N.J. R. SUPER. TAX SURR. CTS. 4:4–4(b)(1); N.M. STAT. ANN. § 38-1-16 (Michie 1998); N.Y. C.P.L.R. § 302 (McKinney 2001); N.C. GEN. STAT. § 1-75.4 (2001); N.D. R. CIV. P. 4(b)(2)(A)–(I); OHIO REV. CODE ANN. § 2307.382 (Anderson 2001); OKLA. STAT. ANN. tit. 12, § 2004(F) (West Supp. 2003); OR. R. CIV. P. 4(B)–(L) (2003); 42 PA. CONS. STAT. ANN. § 5322 (West Supp. 2003); R.I. GEN. LAWS § 9-5-33 (1997); S.D. CODIFIED LAWS § 15-7-2 (Michie 2001); TENN. CODE ANN. § 20-2-214 (1994); TEX. CIV. PRAC. & REM. CODE ANN. § 17.041–17.069 (Vernon 1997); UTAH CODE ANN. § 78-27-24 (2002); VT. STAT. ANN. tit. 12, § 913(b) (2002); VA. CODE ANN. § 8.01-328.1 (Michie Supp. 2003); WASH. REV. CODE ANN. § 4.28.185 (West 1988); W. VA. CODE ANN. § 56-3-33 (Michie Supp. 2003); WIS. STAT. ANN. § 801.05(2)–(11) (West Supp. 2002); WYO. STAT. ANN. § 5-1-107 (Michie 2003).

32. S.C. CODE ANN. § 36-2-801 (Law. Co-op. 1977).

(b) contracting to supply services or things in this State;
(c) commission of a tortious act in whole or in part in this State;
(d) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State; or
(e) having an interest in, using, or possessing real property in this State; or
(f) contracting to insure any person, property or risk located within this State at the time of contracting; or
(g) entry into a contract to be performed in whole or in part by either party in this State; or
(h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

(2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, *and such action, if brought in this State, shall not be subject to the provisions of § 15-7-100(3).*[33]

Much of the above language follows verbatim that of the Uniform Interstate Procedure Act.[34] However, even though South Carolina's long-arm statute, as enacted, effectively broadened the scope of its courts' *in personam* jurisdiction, the statute drew criticism and opposition on state constitutional grounds because it was passed as an amendment to the Uniform Commercial Code.[35] Although the state's

33. S.C. CODE ANN. § 36-2-803 (Law. Co-op. 1977) (emphasis added).

34. Folks, *supra* note 30, at 475 (citing UNIFORM INTERSTATE PROCEDURE ACT § 1.3).

35. Joseph Halstead McGee, Jr., a member of the South Carolina House of Representatives, voted against concurrence to the Senate amendment that added the long-arm statute, stating it was not germane to the bill. JOURNAL OF THE HOUSE OF REPRESENTATIVES, H. 96, 2d Sess., at 1566 (S.C. 1966). He argued that this section dealt with the jurisdiction of the courts and is "major legislation" that "should be considered on its own merits." *Id.*

McGee's argument was later validated in a series of cases decided after the statute was originally enacted. *See, e.g.*, McGee v. Holan Div. of Ohio Brass Co., 337 F. Supp. 72, 75 (D.S.C. 1972); Tention v. S. Pac. R.R., 336 F. Supp. 25, 28 (D.S.C. 1972). The courts in these cases sustained challenges to the act on grounds that it violated Article III, Section 17 of the South Carolina Constitution, which specifies that "[e]very Act or joint resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." *See McGee*, 337 F. Supp. at 76; *Tention*, 336 F. Supp. at 28.

The title of South Carolina's Uniform Commercial Code made no mention of tort claims for personal injuries that were totally unrelated to commercial transactions. 1966 S.C. Acts 1065. The District Court for the District of South Carolina held that the title did not sufficiently reflect the

highest court has found the long-arm statute to be fully effective, it remains questionable why the General Assembly persists on burying the state's long-arm provisions within the Uniform Commercial Code rather than simply transferring the reenacted long-arm statute to the jurisdictional or procedural provisions of the Code. No other state in the nation has enacted its long-arm statute within its Uniform Commercial Code.[36] Why must South Carolina be different?

The location of the long-arm statute within the Code, however, is merely one of the oddities regarding South Carolina's long-arm statute. The most significant difference between South Carolina's long-arm statute and the long-arm statutes of every other state is that section 36-2-803(2) prohibits a nonresident defendant, brought under the court's jurisdiction pursuant to the long-arm statute, from transferring venue under section 15-7-100(3)[37] for the convenience of witnesses and the ends of justice. No other state's long-arm statute limits the defendant's right to transfer venue.[38] Section 36-2-803(2) is subject to constitutional challenges because it limits a defendant's right to change venue when jurisdiction is based on the long-arm statute, unlike any other state. An appellate court has yet to rule on the constitutionality of section 36-2-803(2). However, state trial judges have heard the constitutional arguments and dismissed them without consideration. It is imperative that a higher court resolve the issue.

## III. SECTION 36-2-803(2) VIOLATES THE EQUAL PROTECTION CLAUSE

The Fourteenth Amendment to the United States Constitution forbids a state to

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noncommercial long-arm provisions of South Carolina's Uniform Commercial Code so as to meet the requirements of Article III, Section 17. *See McGee*, 337 F. Supp. at 76; *Tention*, 336 F. Supp. at 28. United States District Court Judge Robert F. Chapman stated: "With such a voluminous act it is doubtful if all of the members of the General Assembly realized that it contained provisions unrelated to commercial transactions." *McGee*, 337 F. Supp. at 76. Judge Chapman found that section 36-2-803(1)(c) and (d) dealt with tortious activity unrelated to commercial transactions—the subject of the act. *Id.* at 75. Thus, these sections were held to be unconstitutional. *Id.* at 76. The court also observed that no notice was given by the title to the act that it contained long-arm provisions for causes of action completely divorced from commercial transactions. *Id.* at 75. Judge Chapman referred to two decisions by South Carolina state trial judges in which each court held that section 36-2-803(c) and (e) violated the requirements of Article III, Section 17 of the South Carolina Constitution. *Id.* (citations omitted).

The rulings of unconstitutionality in the cases above prompted the General Assembly in 1972 to reenact the long-arm provisions under a new title to include long-arm jurisdiction over causes of action that are not related to commercial transactions. 1972 S.C. Acts 1343. The Supreme Court of South Carolina held Act No. 1343 of 1972 to be a "complete remedial statute of substantial benefit. Its homogeneous terms relate to but one subject which is expressed in its title in more detail than is required." Thompson v. Hofmann, 263 S.C. 314, 319, 210 S.E.2d 461, 463 (1974).

36. *See supra* note 31.

37. S.C. CODE ANN. § 15-7-100(3) (Law. Co-op. 1977) ("The court may change the place of trial in the following cases: . . . (3) When the convenience of witnesses and the ends of justice would be promoted by the change.").

38. *See supra* note 31.

"deny to any person within its jurisdiction the equal protection of the laws."[39] Because section 36-2-803(2) does not deprive nonresident defendants "of a fundamental right nor classify along suspect lines like race or religion, [this provision does] not deny equal protection to [nonresident defendants] unless [it] fail[s] in rationally furthering legitimate state ends."[40]

Section 36-2-803(2) violates the Equal Protection Clause of the Fourteenth Amendment because it denies nonresident defendants the same due process of law applied to residents. Nonresident defendants cannot move to transfer venue on the basis of convenience of witnesses or ends of justice when the court has *in personam* jurisdiction over them pursuant to the long-arm statute.[41] However, when the court acquires personal jurisdiction over a defendant by virtue of his or her residency in South Carolina, the resident defendant is permitted to move for transfer of venue on the basis of convenience and justice.[42]

The discriminatory treatment of resident and nonresident defendants in section 36-2-803(2) is similar to that found in a venue statute struck down by the Supreme Court of South Carolina in *Windham v. Pace*.[43] The statute at issue in *Windham* provided that an action against a *resident* motor carrier may be brought only in a *county through which it operates* but an action against a *nonresident* motor carrier may be brought in *any county* of the state.[44] The court found no real distinction between domestic and foreign motor carriers operating under the statute; both engage in the same form of business and make similar use of the state's highways.[45] Therefore, the court found this classification to be "clearly arbitrary" and "not based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."[46] The state supreme court ultimately struck down the venue provisions of this statute because it "manifestly denies the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution."[47]

The *Windham* court cited the United States Supreme Court decision in *Power Manufacturing Co. v. Saunders*[48] as authority for its ruling.[49] In *Saunders*, the Supreme Court held that an Arkansas statute unconstitutionally deprived foreign corporations of equal protection of the law by permitting them to be sued in any county in the state, while actions against domestic corporations could only be brought in counties where they are found, do business, or have a representative.[50]

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39. U.S. CONST. amend. XIV, § 1.
40. *See* Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651 (1992).
41. S.C. CODE ANN. § 36-2-803(2) (Law. Co-op. 1977).
42. S.C. CODE ANN. § 15-7-100(3) (Law. Co-op. 1977).
43. 192 S.C. 271, 6 S.E.2d 270 (1939).
44. *Id.* at 276, 6 S.E.2d at 272.
45. *Id.* at 277, 6 S.E.2d at 273.
46. *Id.*
47. *Id.*
48. 274 U.S. 490 (1927).
49. *Windham*, 192 S.C. at 277–78, 6 S.E.2d at 272–73.
50. *Saunders*, 274 U.S. at 491–92, 497.

The Court concluded "that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary."[51]

Although South Carolina courts have not questioned *Windham*, in *Burlington Railroad Co. v. Ford*,[52] the United States Supreme Court severely limited *Saunders*. In *Burlington*, the Court upheld a Montana statute that permitted "a plaintiff to sue a corporation incorporated in that State only in the county of its principal place of business, but permit[ted] suit in any county against a corporation incorporated elsewhere."[53] The Court applied rational basis review to find that the Montana statute did not violate the Equal Protection Clause.[54] *Saunders* was distinguished on the ground that the Arkansas statute was too overinclusive because it applied only to foreign corporations authorized to do business in Arkansas such that most of the corporations subject to its "any-county rule" probably had a place of business in Arkansas.[55] The Court found that "most of the corporations subject to Montana's any-county rule probably [did] not have their principal place of business in Montana."[56] Thus, while limiting *Saunders*, the Supreme Court maintained that *Saunders* is still good law.[57]

The Arkansas statute in *Saunders* was struck down because it was overly broad, and the Montana statute was upheld in *Burlington* because it was more narrowly focused. Like the statute at issue in *Saunders*, the overinclusiveness of section 36-2-803(2) is so great that it does not rationally implement South Carolina's purpose. Section 36-2-803(2) restricts *all* defendants brought under the court's jurisdiction pursuant to the long-arm statute from transferring venue. Although South Carolina's long-arm statute is most likely to be applied only to nonresidents doing business in the state and not having a place of business in South Carolina, similar to the Montana statute at issue in *Burlington*, section 36-2-803(2) is not narrowly tailored to meet that end. The provision does not differentiate between corporations or individuals, between defendants that may be difficult to serve and those that can be served with relative ease, between defendants that consent to jurisdiction and those that contest jurisdiction, or between defendants who have a great interest in convenience and those that will be similarly inconvenienced no matter where the suit is tried. The *Burlington* court emphasized that "most of the corporations subject to Montana's any-county rule probably do not have their principal place of business in Montana."[58] Thus, the convenience to these corporations of litigating in a particular county was not important. While *Burlington* distinguishes the Montana and Arkansas statutes, the real difference is not apparent. It is apparent,

51. *Id.* at 494.
52. 504 U.S. 648 (1992).
53. *Id.* at 649.
54. *Id.* at 653.
55. *Id.* at 654.
56. *Id.*
57. *Id.*
58. Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 654 (1992).

however, that section 36-2-803(2) is not focused narrowly enough to meet the *Burlington* standard. Most significantly, section 36-2-803(2) overlooks, indeed prohibits, an analysis of the convenience of witnesses or the ends of justice for *all* nonresidents brought within the court's jurisdiction pursuant to the long-arm statute.

In addition, the *Burlington* court made it "clear that a State might temper . . . an 'any county' rule to the extent a reasonable assessment of defendants' interests so justified."[59] One may conclude that South Carolina has determined that nonresident defendants have no interest to justify tempering its any-county rule. Thus, the disparate treatment of nonresidents and residents under section 36-2-803(2) is a far greater denial of equal protection of the law because this provision prohibits a nonresident from transferring venue for the convenience of witnesses and the ends of justice, even in the most egregious cases like the hypothetical presented at the beginning of this Comment. It is constitutional for South Carolina to subject nonresident defendants to venue in any county: *Burlington* made this clear. However, once venue is properly laid pursuant to an any-county rule, a state cannot subsequently prohibit a nonresident defendant from changing venue when a resident defendant in the same case would have such a right. It must be noted that while the Montana statute was upheld, Montana tempers its any-county rule with a statutory provision allowing the courts to change venue for the convenience of witnesses and the ends of justice: "The court or judge *must*, on motion, change the place of trial in the following cases: . . . (3) when the convenience of witnesses and the ends of justice would be promoted by the change."[60] South Carolina prohibits this exact type of transfer, leaving a nonresident defendant no relief from its any-county venue rules.

In *American Service Corp. of S.C. v. Hickle*,[61] the Supreme Court of South Carolina made clear that "[i]n determining whether a statute violates the equal protection clauses of state and federal constitutions, [it] must give great deference to the classification passed by the legislature, and the classification will be sustained against constitutional attack if it is not plainly arbitrary and there is 'any reasonable hypothesis' to support it."[62] The *Hickle* court identified a three-prong test, established in *Samson v. Greenville Hospital System*,[63] to determine if a statute satisfies equal protection:

> (1) [T]he classification bears a reasonable relation to the legislative purpose sought to be effected;
> (2) "the members of the class are treated alike" under similar circumstances and conditions; and

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59. *Id.* at 652.

60. MONT. CODE ANN. § 25-2-201 (2003) (emphasis added).

61. 312 S.C. 520, 435 S.E.2d 870 (1993).

62. *Id.* at 521–22, 435 S.E.2d at 871 (quoting Smith v. Smith, 291 S.C. 420, 424, 354 S.E.2d 36, 39 (1987)).

63. 295 S.C. 359, 368 S.E.2d 665 (1988).

(3) the classification rests on some reasonable basis.[64]

The court in *Hickle* applied the three-prong test to hold that the South Carolina homestead exemption statute, which limits the exemption for personal injury awards to South Carolina residents only, does not deprive nonresidents of equal protection of the law.[65] The court found the statute satisfied the test because "(1) it is reasonably related to the legislative purpose of protecting South Carolina residents from financial indigency; (2) the members of the classes are treated alike since all residents are entitled to the exemption; and, (3) the classification is reasonably based upon South Carolina's legitimate interest in preventing its citizens from becoming dependent upon the [s]tate for support."[66]

Section 36-2-803(2) fails to satisfy any of the three prongs of the test established by the state supreme court in *Samson*. First, to determine if section 36-2-803(2) creates a classification that bears a reasonable relation to the legislative purpose sought to be effected, it is necessary to determine the purpose of the provision. The intent of the long-arm statute, generally, is to extend the personal jurisdiction of South Carolina's courts to the constitutional limits of due process.[67] Where venue may be laid or how venue can be transferred bears no reasonable relation to the assertion of personal jurisdiction. Limiting or restricting change of venue does not further the state's interest in acquiring jurisdiction over a person to the full extent of constitutional due process. Prohibiting a nonresident defendant from changing venue for the convenience of witnesses and the ends of justice does not promote the state's interest in providing resident plaintiffs with jurisdiction over nonresidents. Thus, classifying nonresidents and residents differently for venue purposes within the long-arm statute is not reasonably related to the legislative purpose of asserting personal jurisdiction.

However, South Carolina may have a legitimate purpose in resolving the disparate interests of the parties as to the place of trial.[68] While this is not the normal function or purpose of a long-arm statute, perhaps South Carolina has determined that a plaintiff's interest in suing in the county of his choice deserves greater weight when he acquires personal jurisdiction over a nonresident defendant based on the defendant's limited contacts with the state. South Carolina "could thus have decided that a nonresident defendant's interest in convenience is too slight to outweigh the plaintiff's interest in suing in the forum of his choice."[69] Such a purpose is constitutionally permissible under the Equal Protections Clause.[70]

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64. *Hickle*, 312 S.C. at 522, 435 S.E.2d at 871 (quoting *Samson*, 295 S.C. at 364, 368 S.E.2d at 667 (quoting *Smith*, 291 S.C. at 424, 354 S.E.2d at 39).

65. *Id.*

66. *Id.*

67. *See* Deering Milliken Research Corp. v. Textured Fibres, Inc., 310 F. Supp. 491, 502 (D.S.C. 1970).

68. *See* Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651 (1992).

69. *Id.* at 652.

70. *See id.*

The real purpose of section 36-2-803(2), however, is likely to provide plaintiffs the most advantageous venue for their suits. This purpose alone is not sufficient to avoid the creation of an arbitrary and unreasonable discriminatory classification under a jurisdiction statute.

Second, the members of the class are not treated alike under similar circumstances and conditions. Section 36-2-803(2) prohibits transferring venue for the convenience of witnesses and the ends of justice only when jurisdiction is based *solely* on the long-arm statute.[71] When the General Assembly passed the long-arm statute, it provided in a subsequent section entitled "Other bases of jurisdiction unaffected" that the South Carolina state courts may continue to "exercise jurisdiction on *any other basis* authorized by law."[72] Therefore, if a nonresident defendant is brought within the jurisdiction of the court pursuant to another statute or common law rule, then the section 36-2-803(2) prohibition against transfer of venue should not apply.[73] For example, after the long-arm statute was passed, it was not applied to obtain jurisdiction over the defendant in *Bouvy v. N. W. White & Co.*[74] The Supreme Court of South Carolina in *Bouvy* acknowledged that "[t]he right of a plaintiff to bring an action against a [nonresident] licensed motor carrier in any county . . . is, of course, subject to the power of the court to change the place of trial upon a showing that *both* the convenience of the witnesses and the ends of justice will be furthered by the change."[75] This suggests that some nonresident defendants, such as motor carriers, may move for a change of venue under section 15-7-100(3). Thus, the entire class of nonresident defendants is not treated the same as required by the second prong of the *Samson* test. In this sense, section 36-2-803(2) is underinclusive. If a plaintiff applies a method other than the long-arm statute to obtain personal jurisdiction over a nonresident defendant, then section 36-2-803(2) will not bar the defendant from changing venue for the convenience of witnesses or the ends of justice.

Third, the classification in section 36-2-803(2) likely does not rest on a reasonable basis. As mentioned in the above analysis of the first prong of the *Samson* test, the only legitimate purpose section 36-2-803(2) could serve is to resolve the disparate interests of the parties as to the place of trial. Therefore, what reasonable basis exists for the classification in section 36-2-803(2) that relates to resolving the disparate interests of the parties to the place of trial? Perhaps South Carolina "decided that a nonresident defendant's interest in convenience is too slight," when jurisdiction is based on the long-arm statute, "to outweigh the plaintiff's interest in suing in the forum of his choice."[76] But section 36-2-803(2)

71. S.C. CODE ANN. § 36-2-803(2) (Law. Co-op. 1977).
72. S.C. CODE ANN. § 36-2-805 (Law. Co-op. 1977) (emphasis added).
73. *See* discussion *infra* Part V.
74. 254 S.C. 164, 174 S.E.2d 347 (1970).
75. *Id.* at 166, 174 S.E.2d at 348.
76. Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 652 (1992).

prohibits South Carolina courts from analyzing on a case by case basis the degree of inconvenience to a nonresident defendant of defending in the county of the plaintiff's choice. Thus, South Carolina must have impliedly decided that when a defendant is brought within the court's jurisdiction based on the long-arm statute, his interest in convenience is *always* too slight to outweigh the plaintiff's interest in suing in the forum of his choice. This notion demonstrates both the overinclusiveness and underinclusiveness of section 36-2-803(2). No matter who the defendant is, where he resides, or what his contacts with South Carolina may be, if a plaintiff asserts personal jurisdiction over him based on the long-arm statute, he loses the privilege of transferring venue. Also, nonresident defendants brought within the personal jurisdiction of South Carolina courts by some means other than the long-arm statute do not lose the privilege to transfer venue. Thus, the classification in section 36-2-803(2) probably does not rest on a rational basis.

An appellate court may determine, in a majority of cases in which the long-arm statute is applied, that the defendant's interest in convenience is too slight to outweigh the plaintiff's interest in suing in the forum of his choice and may therefore uphold section 36-2-803(2) as rationally related to a legitimate purpose. Nevertheless, the prohibition against change of venue found in section 36-2-803(2) likely fails to satisfy the *Samson* test; therefore, an appellate court should hold that it violates the Equal Protection Clause. The classification certainly appears to be arbitrary and not based on a real and substantial difference having a reasonable relation to the subject of the legislation—personal jurisdiction.

## IV. SECTION 36-2-803(2) VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE

Article IV, Section 2 of the Constitution of the United States declares "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[77] The definitions of "privileges" and "immunities" within the meaning of this clause have evolved over the nation's history. While the Court has never attempted to formulate a comprehensive list of the rights protected by the Privileges and Immunities Clause, Justice Washington, serving as a circuit justice in *Corfield v. Coryell*,[78] included in a partial list of "fundamental privileges" protected by the clause "the right of a citizen of one state . . . to institute and maintain actions of any kind in the courts of [another] state."[79] However, the United States Supreme Court later abandoned the "natural rights" theory that underlays *Corfield*. In *Paul v. Virginia*,[80] the Supreme Court explained the object of the Privileges and Immunities Clause was "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages

77. U.S. CONST. art. IV, § 2, cl. 1.
78. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).
79. *Id.* at 552.
80. 75 U.S. (1 Wall.) 168 (1868).

resulting from citizenship in those States are concerned."[81] Thus, the Court departed from a "rights of a national citizen" approach to the Privileges and Immunities Clause and adopted an "equality of rights under each state" approach. The Court in *Hague v. Committee for Industrial Organization*[82] repeated the notion that the Privileges and Immunities Clause is meant to guarantee the citizens of any other state the same privileges and immunities enjoyed by the citizens of the state, explaining that this clause "prevents a State from discriminating against citizens of other States in favor of its own."[83] And in *Baldwin v. Fish & Game Commission of Montana*,[84] the Supreme Court established the principle that "[o]nly with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."[85] Still, the Court noted that the clause protects those privileges originally set forth by Justice Washington.[86] Therefore, the right of a citizen of another state to institute and maintain actions of any kind in the courts of the several states remains protected by the Supreme Court's modern interpretation of the Privileges and Immunities Clause.

The constitutional requirement of the Privileges and Immunities Clause is "satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of [his] rights."[87] However, a nonresident is not entitled to the same rights as a resident. The adequacy and reasonableness of the terms under which nonresidents of a state are given access to its courts are to be determined by the courts, and ultimately by the United States Supreme Court.[88] To determine whether a statute violates the Privileges and Immunities Clause, the court must decide whether there is "a *substantial* reason for the difference in treatment" and whether "the discrimination practiced against nonresidents bears a [*close or*] *substantial* relationship to the State's objective."[89] "In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court [will consider] the availability of less restrictive means."[90]

States may proscribe different procedural regulations for residents and nonresidents if required by the due administration of justice to meet and provide for the circumstance of nonresidence.[91] This rule has been applied to such matters as

81. *Id.* at 180.
82. 307 U.S. 496 (1939).
83. *Id.* at 511.
84. 436 U.S. 371 (1978).
85. *Id.* at 383.
86. *Id.* at 387.
87. Canadian N. Ry. Co. v. Eggen, 252 U.S. 553, 562 (1920).
88. *Id.*
89. Supreme Court of N.H. v. Piper, 470 U.S. 274, 284 (1985) (emphasis added).
90. *Id.*
91. *See* Canadian N. Ry. Co. v. Eggen, 252 U.S. 553, 561–62 (1920).

limitations of actions[92] and service of process.[93] The United States Supreme Court, in *Canadian Northern Railway Co. v. Eggen*,[94] upheld the constitutionality of a Minnesota statute that prohibited a plaintiff from maintaining a cause of action within the state if it was barred by the laws of the place where it arose unless the plaintiff was a citizen of the state and owned the action ever since it accrued.[95] On the other hand, the Supreme Court held in *Ownbey v. Morgan*[96] that under the Constitution, a state is "at liberty, if not under a duty," to secure to creditors who are citizens of other states the same protection by foreign attachment over the property of nonresidents that is accorded to its own citizens.[97] Similarly, in *Herzoff v. Hommel*,[98] the Supreme Court of Nebraska struck down a statute limiting continuances granted to defendant nonresident automobile owners to ninety days where residents were not limited in such a way.[99] The *Herzoff* court held this statute did not afford nonresident defendants reasonable opportunity to defend the action and was therefore discriminatory and unconstitutional.[100]

The reasoning of the Nebraska court in *Herzoff* is persuasive and should be adopted by the Supreme Court of South Carolina. Section 36-2-803(2) violates the Privileges and Immunities Clause because it denies nonresident defendants the same opportunities as residents to defend themselves in court. An analysis of the purpose of the South Carolina change of venue statute, section 15-7-100, and the method by which a party can change venue pursuant to the statute demonstrates how section 36-2-803(2) denies nonresident defendants the same opportunity as resident defendants. Therefore, section 36-2-803(2) denies nonresident defendants equal access to the courts—a constitutional right protected by the Privileges and Immunities Clause.

South Carolina Code section 15-7-100(3) provides that the court may change venue "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change."[101] Once venue is laid in a proper county, "[e]ither party may then make a motion to change venue under [this section]."[102] The trial judge has "the sound discretion to change the place of trial if *both* the convenience of witnesses and the ends of justice would be served" by the change.[103] The moving

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92. *Id.* at 563.
93. *See* Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 625–26 (1935).
94. 252 U.S. 553 (1920).
95. *Id.* at 563.
96. 256 U.S. 94 (1921).
97. *Id.* at 109–10 (citing Blake v. McClung, 172 U.S. 239, 248 (1898)).
98. 233 N.W. 458 (Neb. 1930).
99. *Id.* at 460.
100. *Id.*
101. S.C. CODE ANN. § 15-7-100(3) (Law. Co-op. 1977).
102. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 334, 479 S.E.2d 67, 70 (Ct. App. 1996).
103. *Id.* at 335, 479 S.E.2d at 71 (emphasis added) (citing Arledge v. Colonial Oil Indus., Inc., 272 S.C. 88, 94, 249 S.E.2d 740, 742 (1978); Skinner v. Santoro, 245 S.C. 35, 38, 138 S.E.2d 645, 646 (1964)).

party bears the burden of proof for these elements.[104] "Once the moving party [for a change of venue] makes a prima facie showing [that the] venue change will serve both the convenience of the witnesses and the ends of justice, the burden shifts to the party resisting the motion to overcome at least one of these requirements."[105]

When deciding whether a change of venue would be more convenient for witnesses, the Supreme Court of South Carolina explained, "'It is not a question of how much their convenience would be promoted thereby, but *whether* it would be so promoted.'"[106] While "distance alone is not determinative, [the court will presume] it is more convenient to travel a lesser rather than a greater distance."[107] Once convenience of witnesses has been shown, this proof "can, depending on the facts of the case, bear on the issue of promotion of justice."[108] Indeed, "a showing of convenience of witnesses constitutes a *prima facie* showing that the ends of justice would be promoted by the change."[109] In determining whether changing venue satisfies the ends of justice requirement, the court has more narrowly stated that "the ends of justice are promoted by having the credibility of witnesses judged by jurors of the vicinage, the county in which the witnesses reside."[110] Thus, the Supreme Court of South Carolina recognizes the importance of placing venue in a jurisdiction in or near the county in which the witnesses reside.

By denying the opportunity to change venue under section 15-7-100(3), section 36-2-803(2) effectively eliminates a nonresident defendant's right to have suits tried in a county that is close to a majority of the witnesses in the case and to have the credibility of the witnesses judged by jurors of the same vicinage. The constitutional requirement of the Privileges and Immunities Clause is therefore not satisfied because nonresident defendants are not given access to the courts of the state upon terms which are reasonable and adequate for enforcing their rights.

No substantial reason exists for the difference in treatment between residents and nonresidents regarding change of venue. Further, the discrimination against nonresidents does not bear a close or substantial relationship to the state's objective in asserting personal jurisdiction to the full extent of constitutional due process. Also, less restrictive means are available to ensure the state's long-arm statute

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104. *Id.* at 335, 479 S.E.2d at 71 (citing Brice v. State Co., 193 S.C. 137, 140, 7 S.E.2d 850, 851 (1940)).

105. *Id.* at 336, 479 S.E.2d at 71 (citing Mixson v. Agric. Helicopters, Inc., 260 S.C. 532, 535, 197 S.E.2d 663, 664 (1973)).

106. *Id.* at 340, 479 S.E.2d at 73 (quoting Reynolds v. Atl. Coast Line R. Co., 217 S.C. 16, 21, 59 S.E.2d 344, 346 (1950)) (emphasis added by the court).

107. *Id.* at 339, 479 S.E.2d at 73 (citing Arledge v. Colonial Oil Indus., Inc., 272 S.C. 88, 91, 249 S.E.2d 740, 741 (1978) (explaining that "'ordinarily, the necessity to travel a greater distance would sustain an inference of inconvenience'")).

108. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 335, 479 S.E.2d 67, 71 (Ct. App. 1996) (citing Varnadoe v. Hicks, 264 S.C. 216, 219, 213 S.E.2d 736, 737–38 (1975)).

109. *Id.* at 335, 479 S.E.2d at 71 (citing Beard v. Billups Petroleum Co., 228 S.C. 481, 483, 90 S.E.2d 685, 686 (1956)).

110. *Id.* at 335–36, 479 S.E.2d at 71 (citing Holden v. Beach, 228 S.C. 234, 239, 89 S.E.2d 433, 435 (1955)).

reaches the limitations of constitutional due process. The provision prohibiting change of venue in the long-arm statute is not needed to effectively extend the personal jurisdiction of South Carolina courts to the full limitations of constitutional due process. Likewise, the distinction between residents and nonresidents made in section 36-2-803(2) is not fairly required by the due administration of justice to meet and provide for the circumstance of nonresidence. Once a South Carolina court successfully acquires personal jurisdiction over a nonresident defendant, no legitimate purpose for the administration of justice is met by confining the defendant to defend the case in the county of the plaintiff's choice. Either party, whether plaintiff or defendant, should have the right to transfer venue for the convenience of witnesses and the ends of justice. Therefore, because section 36-2-803(2) denies nonresident defendants equal access to the courts of South Carolina, in violation of the Privileges and Immunities Clause, it is unconstitutional.[111]

## V. POSSIBLE ARGUMENTS TO AVOID THE PROHIBITION

Nonresident defendants can possibly avoid the section 36-2-803(2) strict prohibition against transferring venue for the convenience of witnesses and the ends of justice by proving that the court acquired or could have acquired *in personam* jurisdiction over them pursuant to another statute or by common law. Section 36-2-803(2) specifically states that only "[w]hen jurisdiction over a person is based *solely* upon this section"[112] will the motion for change of venue for the convenience of witnesses and the ends of justice be prohibited. Thus, a nonresident defendant need only prove that personal jurisdiction was or could have been acquired over him through some other means. The General Assembly, when passing the long-arm statute, provided in a subsequent section entitled "Other bases of jurisdiction unaffected" that the South Carolina state courts may continue to "exercise jurisdiction on *any other basis* authorized by law."[113] Reading section 36-2-803 and section 36-2-805 together allows South Carolina courts to acquire personal jurisdiction over nonresident defendants pursuant to the long-arm statute or by any other means previously available to the court. If the court uses other means to gain personal jurisdiction over the nonresident defendant, then the defendant maintains the right to transfer venue for the convenience of witnesses and the ends of justice.

### *A. Jurisdiction by Consent*

Likely, the most effective way for a nonresident defendant to convince the court

111. One should note, however, that the Privileges and Immunities argument to invalidate section 36-2-803(2) will only benefit individuals. A corporation is not considered a "citizen" within the meaning of the Privileges and Immunities Clause and therefore receives no constitutional protections from the clause. Paul v. Virginia, 75 U.S. (1 Wall.) 168, 178 (1868).

112. S.C. CODE ANN. § 36-2-803(2) (Law. Co-op. 1977) (emphasis added).

113. S.C. CODE ANN. § 36-2-805 (Law. Co-op. 1977) (emphasis added).

that it acquired *in personam* jurisdiction over him not *solely* based on the long-arm statute is to argue that he consented to the court's jurisdiction. The Supreme Court of South Carolina has stated that "[i]t has long been the law of the state of South Carolina that lack of subject matter jurisdiction cannot be waived even by consent but lack of jurisdiction of the person may be waived."[114] The court has repeatedly held that a defendant may confer jurisdiction over his person by consent.[115]

The Restatement (Second) of Conflict of Laws is in accord with the common law of South Carolina, declaring that "[a] state has power to exercise [personal] jurisdiction" over nonresident individuals and corporations which "consent[] to the exercise of such jurisdiction."[116] This consent "may take the form of a confession note, or of the waiver of service of process or of . . . acceptance of process outside the state of the forum."[117] Nonresidents are also subject to the jurisdiction of a court by making a general appearance in an action.[118] Unless a nonresident defendant appears specially to contest jurisdiction, he consents to the court's jurisdiction, giving the court *in personam* jurisdiction over the defendant by both the long-arm statute and consent. This ultimately requires a nonresident defendant to balance the benefits of contesting or consenting to jurisdiction. The defendant must decide to consent to the jurisdiction of the South Carolina courts and retain the statutory privilege to change venue or to contest jurisdiction and subsequently lose the privilege to change venue. This is not a beneficial trade-off.

A nonresident defendant, individual or corporation, may also give consent by designating an agent or public official upon whom service may be made.[119] South Carolina, by statute, can require a nonresident to appoint an agent or a public official to accept service of process in certain cases.[120] If a nonresident does appoint such an agent, the nonresident is subject to *in personam* jurisdiction in the state as to all causes of actions to which the authority of the agent or official to accept service extends.[121] Such is the case when a foreign corporation must appoint an agent for service of process to receive authorization to do business in South Carolina. When service of process is made upon a foreign corporation in accordance with the method provided in section 15-9-240,[122] such service is

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114. Firestone Fin. Corp. v. Owens, 309 S.C. 73, 75, 419 S.E.2d 830, 832 (Ct. App. 1992) (citing Lillard v. Searson, 170 S.C. 304, 307, 170 S.E. 449, 451 (1933)).

115. *See, e.g.*, State v. Douglas, 245 S.C. 83, 87, 138 S.E.2d 845, 847 (1964) (finding that a defendant waived the jurisdictional objection by his failure to interpose it at the time of trial) (citing City of Florence v. Berry, 61 S.C. 237, 240, 39 S.E. 389, 390 (1901)).

116. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 32, 43 (1971).

117. *Id.* § 43 cmt. b.

118. *Id.* §§ 32 cmt. d, 33, 45.

119. *Id.* §§ 32 cmt. f, 35 cmt. b, 43 cmt. b, 44.

120. *Id.* §§ 32 cmt. f, 35 cmt. b, 43 cmt. b, 44 cmt. b.

121. *Id.* §§ 32 cmt. f, 35 cmt. b, 43 cmt. b, 44 cmt. a.

122. S.C. CODE ANN. § 15-9-240 (West Supp. 2002) ("Service of process on authorized foreign corporation.").

sufficient to confer jurisdiction upon the court in South Carolina.[123]

Since the passage of the long-arm statute, section 15-9-240 has been rarely applied to acquire personal jurisdiction over nonresident defendants. However, before the passage of the long-arm statute, this section was frequently applied to gain personal jurisdiction over foreign corporations.[124] Because section 36-2-805 declares that the long-arm statute does not affect other bases of jurisdiction, the defendants can resurrect the applicability of section 15-9-240 to subject foreign corporations to *in personam* jurisdiction and avoid the transfer of venue limitation of section 36-2-803(2).

### *B. Jurisdiction by Implied Consent*

A nonresident defendant may argue that the courts of this state acquired *in personam* jurisdiction over him not solely based on the long-arm statute, but through implied consent. By statute, a state can declare that a nonresident may subject himself to the jurisdiction of the state's courts by doing acts in the state which are dangerous to life or property, such as operating an automobile within the state.[125] The defendant thus subjects himself to the jurisdiction of the state's courts as to causes of action arising out of such acts.[126]

South Carolina's nonresident motorist statute does exactly this. Section 15-9-350 provides that the operation of a motor vehicle by a nonresident on the public roads of South Carolina "shall be deemed equivalent to the appointment by such

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123. *See* Roorda v. Volkswagenwerk, A.G., 481 F. Supp. 868, 870 (D.S.C. 1979).

124. *See, e.g.*, Shealy v. Challenger Mfg. Co., 304 F.2d 102, 107–08 (4th Cir. 1962) (holding that a Tennessee manufacturer had "sufficiently substantial and regular" activity in South Carolina to be amenable to suit in the state and was subject to substituted service of process under the South Carolina statute permitting such service upon foreign corporations transacting business in the state); Bramlett v. Arthur Murray, Inc., 250 F. Supp. 1011, 1016 (D.S.C. 1966) (holding that a Delaware corporation maintained such control "over its franchise dealers as to constitute the 'minimum contacts' required to validate plaintiffs' substituted service of process upon it through the Secretary of State of South Carolina"); Szantay v. Beech Aircraft Corp., 237 F. Supp. 393, 398 (D.S.C. 1965) (holding that a manufacturer had sufficient control over its South Carolina distributor to satisfy the "minimum contacts" standard and was therefore amenable to service in South Carolina), *aff'd*, 349 F.2d 60 (4th Cir. 1965); Springs Cotton Mills v. Machinecraft, Inc., 156 F. Supp. 378, 372 (D.S.C. 1957) (holding that a foreign corporation had "not maintained the necessary relations, contacts or ties with the State of South Carolina to justify the State Court's jurisdiction over it which was sought to be perfected by service upon the Secretary of State"); Ezell v. Rust Eng'g Co., 75 F. Supp. 980, 985 (D.S.C. 1948) (holding that service of process on the process agent appointed by a Delaware corporation under the South Carolina statute was effective to confer jurisdiction over the corporation); Boney v. Trans-State Dredging Co., 237 S.C. 54, 63–64, 115 S.E.2d 508, 513 (1960) (holding Florida dredging corporation's operations within South Carolina sufficient to render the corporation subject to the jurisdiction of South Carolina courts and to substituted service of process); State v. Ford Motor Co., 208 S.C. 379, 390–39, 38 S.E.2d 242, 247 (1946) (finding sufficient evidence that a foreign motors corporation was doing business in South Carolina "to subject it to the jurisdiction of [the state's] courts, obtainable by service of process through the Secretary of State").

125. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 36 cmt. c–d, 49 cmt. a (1971).

126. *Id.*

nonresident of the Director of the Department of Public Safety . . . to be his true and lawful attorney upon whom may be served all summons or other lawful process in any action or proceeding against him" arising from his operation of the motor vehicle within the state.[127] When a nonresident individual or a corporation by its agent makes use of the public highways of South Carolina, he accepts the conditions of the statute and therefore "waive[s] the question of jurisdiction."[128] New York has also recognized that a "plaintiff in a South Carolina court may gain personal jurisdiction over a nonresident motorist by serving the South Carolina Director of the Department of Public Safety as attorney for the nonresident motorist."[129]

As noted above, section 36-2-805 declares that the long-arm statute does not affect other bases of jurisdiction. Therefore, nonresident defendants can resurrect the applicability of section 15-9-350 to acquire *in personam* jurisdiction over nonresident motorists and avoid the transfer of venue limitation of section 36-2-803(2). This argument would help Bill Jones, the nonresident defendant in the hypothetical above, to avoid the injustice of section 36-2-803(2) barring his transfer of venue motion to the county where the accident occurred and all the witnesses reside.

### *C. General Jurisdiction*

While section 36-2-803 provides a method for acquiring specific jurisdiction over a nonresident defendant, South Carolina's Uniform Commercial Code also provides a method for acquiring general jurisdiction over nonresident defendants.[130] Section 36-2-802 provides that "[a] court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to *any* cause of action."[131] A nonresident defendant can argue that section 36-2-802 applies to give the court personal jurisdiction over him as to all causes of action, whether or not the suit arises out of the defendant's activities within South Carolina. The court would then have general jurisdiction over the defendant, the long-arm statute would not be the sole basis of jurisdiction, and the nonresident defendant would still have the right to transfer venue for the convenience of witnesses and the ends of justice.

In *Troy H. Cribb & Sons, Inc. v. Cliffstar Corp.*,[132] the Supreme Court of South Carolina found that a foreign food-processing corporation was subject to general jurisdiction when it shipped "in excess of 25,000 cases of its foodstuffs to wholesale and retail distributors" in South Carolina and when an in-state broker negotiated a

127. S.C. CODE ANN. § 15-9-350 (West Supp. 2002).
128. Krueger v. Hider, 48 F. Supp. 708, 710 (D.S.C. 1943).
129. Morrison v. Budget Rent A Car Sys., Inc., 657 N.Y.S.2d 721, 730 (N.Y. App. Div. 1997).
130. S.C. CODE ANN. § 36-2-802 (Law. Co-op. 1977).
131. *Id.* (emphasis added).
132. 273 S.C. 623, 258 S.E.2d 108 (1979).

substantial portion of this business.[133] The *Troy* court also found that the defendant corporation was simultaneously amenable to *in personam* jurisdiction of the state's courts under the long-arm statute.[134] *Troy*, therefore, supports the proposition that a court may maintain more than one basis to acquire *in personam* jurisdiction over a nonresident defendant. This allows a nonresident defendant to prove he is amenable to the court's jurisdiction through the general jurisdiction statute as well as the long-arm statute and avoid the limitation on change of venue in section 36-2-803(2).

However, it is unusual to make a defendant argue that the court should have broader jurisdiction over the defendant than the plaintiff alleges in the complaint. In most circumstances, the plaintiff is the party arguing that the court has general jurisdiction over a defendant. It is equally unusual to imagine a plaintiff arguing *against* the court acquiring general jurisdiction. Normally plaintiffs want to establish, not reject, the right to sue a defendant for any cause of action, whether or not it arises from the defendant's activities with the forum state. In this regard, section 36-2-803(2) encourages the parties to a case to make jurisdictional arguments that are normally against their best interest, in a general sense, in order to attain favorable venue rules in the particular case at issue.

### *D. Jurisdiction by Statutory Service*

The Supreme Court of South Carolina has held that personal jurisdiction is authorized by section 15-9-750,[135] which provides for personal service outside the state in cases where service by publication is permitted under section 15-9-710, if the defendant has sufficient minimum contacts with the state.[136] Section 15-9-710 provides service may be made by publication in the following cases:

> (1) [W]hen the defendant is a foreign corporation and has property within the State or the cause of action arose therein;
> (2) when the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors or to avoid the service of a summons or keeps himself concealed therein with like intent;
> (3) when the defendant is a resident of this State and after a diligent search cannot be found;
> (4) when the defendant is not a resident of this State but has property therein and the court has jurisdiction of the subject of the action;
> (5) when the subject of the action is real or personal property in

133. *Id.* at 625, 258 S.E.2d at 109.
134. *Id.*
135. S.C. CODE ANN. § 15-9-750 (Law. Co-op. 1977).
136. *See* Hendrix v. Hendrix, 296 S.C. 200, 202–03, 371 S.E.2d 528, 529–30 (1988).

this State and the defendant has or claims a lien or interest, actual or contingent, therein or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein;

(6) when the defendant is a party to an adoption proceeding and is either a nonresident or a person upon whom service cannot be had within the State after due diligence;

(7) when the defendant is a party to a proceeding for the determination of parental rights and is either a nonresident or a person upon whom service cannot be had within the State after due diligence; and

(8) when the defendant is a party to an annulment proceeding or where the subject of the matter involves the custody of minor children, support of minor children or wife, separate maintenance, or a legal separation.[137]

According to the Supreme Court of South Carolina in *Hendrix v. Hendrix*,[138] if a nonresident defendant is personally served outside the state in one of the cases listed above, then sections 15-7-90 and 15-7-710 apply to give South Carolina courts personal jurisdiction over the defendant.[139] Although this is admittedly creative lawyering, if the nonresident defendant can satisfy these requirements, he may be able to convince the court that the long-arm statute was not the only means by which the plaintiff could have asserted personal jurisdiction over the defendant and thus avoid the long-arm statute's prohibition against changing venue for convenience and justice.

### *E. Jurisdiction by In-State Service of Process*

Historically, the authority of the court to acquire *in personam* jurisdiction over a defendant required service of process within the territorial jurisdiction of the court.[140] The United States Supreme Court has held that a court may still exercise personal jurisdiction based on service on the defendant while present in the state.[141] Justice Scalia stated "that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"[142]

Arguing personal jurisdiction by in-state service of process, however, is not

137. S.C. CODE ANN. § 15-9-710 (Law. Co-op. Supp. 2002).
138. 296 S.C. 200, 371 S.E.2d 528 (1988).
139. *Id.* at 202–03, 371 S.E.2d at 529–30.
140. *See supra* Part II.A.
141. Burnham v. Superior Court of Cal., 495 U.S. 604, 619 (1990).
142. *Id.*

likely to help most nonresident defendants, because most are served outside the state. Nonetheless, if the defendant is served while within the state of South Carolina, he can argue that this type of service granted personal jurisdiction over him and no other basis for asserting personal jurisdiction was necessary. The long-arm statute would therefore not be the sole basis of jurisdiction when such service is made and section 36-2-803(2) would not apply.

## VI. CONCLUSION

Until stricken as unconstitutional, section 36-2-803(2) forces nonresident defendants to argue that South Carolina courts can exercise *in personam* jurisdiction through a basis other than the long-arm statute. A nonresident defendant has the burden of proof to show that the court has jurisdiction over him through some other means if he wants to avoid the long-arm statute's prohibition against change of venue for the convenience of witnesses and ends of justice. Therefore, section 36-2-803(2) has arguably overruled common law rules regarding who carries the burden of proving the court's jurisdiction.

South Carolina likely does not intend for nonresident defendants to resurrect past methods of asserting personal jurisdiction. This would inhibit the purpose of the long-arm statute. The long-arm statute combines past theories of specific jurisdiction into a single statute and extends the jurisdiction of the state's courts to the constitutional limits of due process. However, the courts may have to reconsider these old theories in dealing with section 2 of the long-arm statute. Thus, the purpose of the long-arm statute is significantly inhibited if the court is compelled to determine on a case by case basis whether personal jurisdiction can be based on some other theory.

This jurisdictional dilemma will continue until an appellate court rules on the constitutionality of the provision in section 36-2-803(2) which prohibits a nonresident defendant from changing venue for the convenience of witnesses and the ends of justice. A court should hold that section 36-2-803(2) violates the Equal Protection Clause of the United States Constitution because it is arbitrary and not based on a real and substantial difference having a reasonable relation to the subject of the long-arm statute. A court should also hold that this provision violates the Privileges and Immunities Clause of the Fourteenth Amendment of the United States Constitution because nonresident defendants are not given equal access to the courts of South Carolina on terms adequate to defend their rights. Until a court addresses the constitutionality of § 36-2-803(2) and strikes the clause prohibiting change of venue, this Comment provides some alternative arguments to avoid the harshness of section 36-2-803(2).

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